

Children's constitutional right to social services

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Section 28(1)(c) of the Bill of Rights in the South African Constitution guarantees every child the right to social services: "Every child has the right to basic nutrition, shelter, basic health care services and social services."

This essay describes the legal scope and content of children's constitutional right to social services. The term 'social services' is often used to mean a group of services including education, health, housing, social security and social welfare services. This essay argues however that the term 'social services' in the Bill of Rights refers to a specific, narrower set of services. In reaching a conclusion as to what these services are, the essay interprets the right to social services in the context of children's rights and also the general socio-economic rights applicable to everyone in the Constitution.

This essay:

- discusses why it is important to define the right to social services;
- defines what social services are;
- explains how the right to social services is distinct from children's other basic socio-economic rights;
- looks at the obligations on the State to deliver social services; and
- comments on the relationship between broad socio-economic rights and children's rights to care, protection and social services.

Why define the right to social services?

Address the apartheid legacy

Under apartheid South Africa operated under a 'residual system' of social welfare, which means that remedial services were offered only once social problems had already manifested. This system did not recognise that most social ills were a direct result of poverty and also did not provide services that could prevent the occurrence of such social problems. Service provisioning was also reserved for a selected minority.

The Constitution was designed to address apartheid legacies including widespread poverty and the disruption of family and community life. The inclusion of broad socio-economic rights, such as the rights to health care services, food, water and social security, is one of the ways the Consti-

itution aims to address the injustices of the past. In addition, it identifies children as a vulnerable group who have extra rights, such as the right to social services. The inclusion of socio-economic rights in the Bill of Rights, as well as children's extra rights, indicates that the Constitution mandates a developmental social welfare system. Broadly speaking, a developmental social welfare system aims to combine social development with economic development and to ensure the equality of vulnerable groups.

Evaluate legislation and policies that aim to give effect to the right

Generally, constitutional rights are given effect through policy and legislation. Both the policy framework and the primary law, the Children's Act, aimed at giving effect to the right to social services, have been established. (These are discussed in the essays on page 29 and 35 respectively). The Children's Act also aims to give effect to the right of children to "family care or appropriate alternative care", and the right to "protection from maltreatment, neglect, abuse or degradation". Defining the full scope and extent of the right to social services is important to evaluate whether the Children's Act, together with its regulations, provide the necessary legislative framework to give effect to this right.

Guide planning, evaluation and monitoring

The term 'social services' has not been used consistently since the adoption of the Constitution in 1996. Decision-makers and drafters of policy are not always talking about the same services when they talk about social services because the term has different meanings in different disciplines. In section 28(1)(c) of the Bill of Rights, however, the term needs to be interpreted within the constitutional framework. To plan and monitor delivery there must be agreement on what the right to social services means and what services children are entitled to in terms of this right. It is also critical for determining the necessary budget for all aspects of implementation.

Meet the need for social services

There has been much progress in developing the social security system since the Constitution was adopted, but significant progress in delivering social services for children has not happened. In addition to apartheid legacies, HIV/AIDS is now

DIAGRAM 2: Examples of social services recommended by the CRC

Children's constitutional rights	Examples of recommended social services
<p>The right to family care or parental care: section 28(1)(b)</p>	<p>Existing care arrangements must be respected and protected by the State. Common responsibility between parents must be encouraged. Children should not have to be removed from parents for reasons of poverty or homelessness:</p> <ul style="list-style-type: none"> • Education and support for parents, children, caregivers and professional groups; • Support for single parents or caregivers; • Support for families at the risk of breaking down; • Drug and alcohol counselling for parents; • Community-based day-care centres; • Early childhood development services; • Participation of children and all interested parties in debates on the removal of children.
<p>The right to appropriate alternative care when removed from the family environment: section 28(1)(b)</p>	<p>Children removed from the family environment are entitled to special care and assistance and have a right to a variety of services. Social workers should have the authority to co-ordinate these services. A hierarchy of placements dictates that first the child must be kept in the extended family, then in a family-like environment and, only if that fails, should the child be placed in a suitable institution:</p> <ul style="list-style-type: none"> • Foster care (including training and supervision of parents and placements and periodic review); • Adoption or <i>kafallah</i>; • Periodic review of placements; • Placement in suitable institutions; • Special assistance and reunification services for children living and working on the streets; • Special assistance to unaccompanied foreign children; • Collection of data on child abandonment and all other children removed from the family environment.
<p>The right to be protected against abuse, neglect, maltreatment and degradation: section 28(1)(d)</p>	<p>Services directed at the protection against all forms of abuse and neglect are aimed at children in any care arrangement. Parents and family have the primary duty to protect the child against any forms of abuse and neglect and the State has a duty to assist the parents in this. For children who do not live in the family environment, the State has to fulfil the role of the parents and family:</p> <ul style="list-style-type: none"> • Social programmes supporting the child and the person caring for the child; • Measures to identify, report, refer, investigate, treat and follow up on instances of abuse and neglect; • Advice and counselling for children who have suffered abuse or neglect; • Services directed at women and children suffering from domestic violence; • Reintegration services for abused, neglected or exploited children; • Rehabilitation for children who are abusing drugs or narcotics; • Community-based day-care centres; • Training of specialised personnel to deal with child abuse cases; • Recovery and reintegration programmes for children who have suffered any abuse or neglect; • Psychological counselling for families and their children where abuse and neglect occurred; • Gender-sensitive training for professionals dealing with child abuse and neglect.
<p>The right to equality: section 9(3)</p>	<p>Services for children with disabilities:</p> <ul style="list-style-type: none"> • Rehabilitation services for children with disabilities; • Services enabling maximum social integration; • Support for families with children who have disabilities; • Information campaigns about disability and prevention methods; • Vocational training for children with disabilities. <p>Services specifically for unaccompanied foreign children:</p> <ul style="list-style-type: none"> • Humanitarian assistance for children and their families; • Registration of the child and appointment of a guardian; • Reunification and family-tracing services. <p>List of services still to be developed for other categories of children needing special care and protection:</p> <ul style="list-style-type: none"> • Children who live and work on the streets; • Children who have suffered from the worst forms of child labour; • Children who have been trafficked and children with chronic illnesses.

Source: With slight amendments from: Dutschke M (2007) *Rights in brief: Defining children's constitutional right to social services*. Cape Town: Children's Institute, UCT.

exacerbating the acute poverty and dislocation experienced by children. As in the past, non-profit organisations (NPOs) continue to deliver the bulk of social services to children. These organisations depend mainly on donor funding and operate with tight budgets in the face of great need. As a result they find themselves having to focus predominantly on crisis situations. This has meant that desperately needed prevention services, such as early childhood development services, are being neglected. Defining the right establishes that social services are part of government's constitutional obligation and gives a firm foundation to prioritise reform and delivery.

What are social services?

The Constitutional Court has a process to define rights which involves looking at the ordinary meaning of the words, their purpose in the Constitution, the contextual meaning of the words, previous court judgments (jurisprudence) and international law. This approach is used in this essay to define the scope and content of children's right to social services.

Social work-type interventions

The ordinary meaning of 'social services' suggests that the right is located in social work-type interventions and social work concepts. This gives a broad understanding of the term but does not exactly explain what services are covered under this right.

Services giving effect to children's rights to care and protection

The scope and content of children's rights are addressed in a number of international and regional legal documents binding on South Africa, such as the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Charter). The Constitutional Court in the famous *Grootboom* case upheld the role of section 28 (children's rights) in incorporating these international legal obligations.

While neither the CRC nor other international legal documents use the term 'social services', both the CRC and the African Charter address children's right to family care and appropriate alternative care (care) as well as the right to be protected against maltreatment, abuse, neglect or degradation (protection). The jurisprudence of the Constitutional Court and legal analyses by academics have suggested that children's socio-economic rights, such as the right to social services, must be read in the context of these care and protection rights. What this implies is that the right to social services relates to services designed to realise the rights to care and protection.

The commentary and supporting materials to the relevant international laws show what specific social services are recommended to give effect to care and protection rights. These are presented in diagram 2 and can be classified into different layers:

- Services that give effect to the right to family care, for example support programmes for parents.
- Services that give effect to the right to be protected against abuse, neglect, maltreatment and degradation, for example, community-based day-care centres.
- Services for children who are removed from the family environment, for example, children's homes.
- Services for children in special circumstances, for example, children with disabilities.

The recommended services in the diagram represent the different layers of services that this essay argues the State is obliged to deliver under children's right to social services. These layers of services and their appropriateness were developed from international law and related commentary and were confirmed by a broad representation of South African service providers at a Children's Institute-hosted workshop in early 2007.

Multiple forms of prevention services

To give full effect to the right to social services, appropriate interventions must exist for each service layer. Services are often classified according to prevention, early intervention and protection. Here they have been classified according to the rights they give effect to because, depending on the situation, a protection service could also be called a prevention service. For instance in the case where a child is removed from an abusive home, further abuse is prevented. Nevertheless, currently services aimed at preventing abuse and neglect need more attention. These services tend to fall into the first two layers, i.e. services giving effect to family care, or services giving effect to protection from abuse. The case study on page 26 illustrates how access to prevention and early intervention services may have stopped the cycle of abuse and neglect across generations.

Social services are distinct from social security

The focus in a developmental social welfare system is on paralleling economic and social development. Social services are therefore often wrongly equated with social security, which is the primary poverty alleviation mechanism. The *Supplementary Memorandum on Bill of Rights and Party Submissions*, a drafting document of the Constitution, shows that the right to social services for children is in addition to and distinct from the broad right to social security: "The right to social services is important for children because it implies the

CASE STUDY 2: At which point should service delivery be emphasised?

After her mother left, Rochelle* grew up in the care of her father. He did shift work, was rarely at home and Rochelle was often in trouble at school. As Leila, the social worker who later counselled Rochelle said: "There were multiple points at which interventions could have been made. Rochelle and her father would have benefited from counselling, for example."

When Rochelle was a teenager, her mother died of AIDS. With her mother dead from a stigmatising disease and her father still largely absent, Rochelle moved to Cape Town. In 2006, as a 19-year-old she got pregnant and was diagnosed as HIV positive. "Another missed opportunity to access social services for Rochelle," said Leila, who further commented that: "Here was a very young woman, pregnant and alone in a strange city. Enrolling Rochelle in a support group for positive people, or for single mothers, could have made a critical difference."

When the baby Kyle was born, Rochelle tried to get a Child Support Grant for him but failed because she had no identity documents. "Ideally," said Leila, "the social security

officials who Rochelle was in contact with would have had a little training and have a list of referrals for people in desperate circumstances."

Rochelle and Kyle lived with Rochelle's abusive boyfriend on whom they were dependent for food and shelter. Even so, some days they went without food. Rochelle sometimes left Kyle with an elderly woman with a drinking problem who lived across the road while she searched for employment. Something, noted Leila, which would not be necessary if there had been a partial care facility in the area.

At 15 months Kyle was admitted to a tertiary hospital with multiple injuries, none of which Rochelle could account for. He had burn marks, a skull fracture, skin lesions, tuberculosis and pneumonia. The 21-year-old Rochelle was interviewed by Leila who asked her about her history to establish what to do with her son Kyle. "Please help me," she said, "take this child for a few months." Kyle was placed in a children's home in the care of the State.

* All names have been changed to protect identities

Source: Department of Health, Western Cape

provision of social workers and other services necessary for the welfare of children. Social services should be distinguished from social security because social services are based on social work and contribute to the welfare and development of both individuals and groups in the community."

How is the right to social services distinct from children's other basic socio-economic rights?

Children's other basic socio-economic rights have corresponding broad socio-economic rights

As stated earlier, everyone is entitled to have access to broad socio-economic rights. These socio-economic rights are limited to progressive realisation as resources become available. The Constitution also specifies certain basic socio-economic rights for children, which are not explicitly limited by progressive realisation or availability of resources. These rights (the broad and the basic) correspond to each other and are illustrated in blue in diagram 3.

Everyone, including children, has for example the right to have access to adequate housing, while children in addition have the right to shelter. Everyone has the right to have access to health care services, while children in addition have the right to basic health care services. Children's right to social services (in orange in the diagram) has no corresponding broad right.

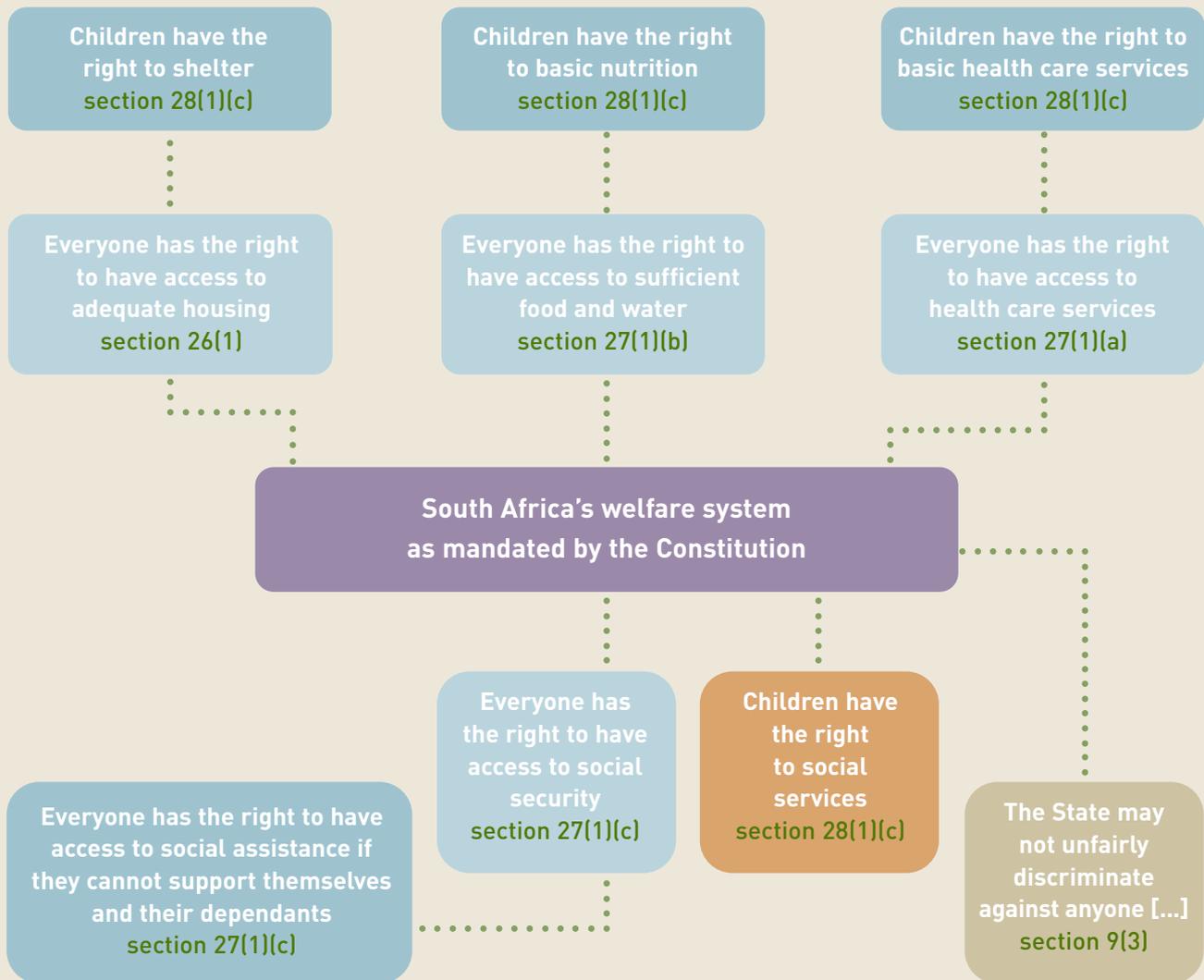
The Court has limited children's basic socio-economic rights due to their correspondence with broad socio-economic rights

Reading the right to shelter in the context of children's right to parental and family care, the Constitutional Court in *Grootboom* held that children's socio-economic rights must be interpreted in relation to the corresponding broad right, which have limitations attached to them. The fact that children's right to social services has no corresponding broad socio-economic right in the Constitution implies that limitations relating to socio-economic rights do not apply to this right. Also, because the right to social services gives effect to care and protection rights (which are arguably not socio-economic) this essay argues that the State has the obligation to prioritise the funding and implementation of a system of social services.

What are the obligations on the State to deliver social services?

For every right there are a range of people with the obligation to make sure that the right is met. These people are called "duty-bearers". Part of defining a right involves establishing who the duty-bearers are. In the case of children's rights, it is also necessary to understand who the primary and secondary duty-bearers for these rights are, because in some instances the obligation on the State only comes into play where the primary duty-bearers fail.

DIAGRAM 3: The relation between children’s right to social services and other relevant constitutional rights



Source: Dutschke M (2007) *Rights in brief: Defining children's constitutional right to social services*. Cape Town: Children's Institute, UCT.

The Constitutional Court has not yet dealt directly with the right to social services, but inferences can be made from the Court’s interpretation of children’s other basic socio-economic rights.

The State must provide support services to parents as primary duty-bearers for care

Constitutional Court jurisprudence has confirmed that children have the right to parental or family care in the first place. Only when that is lacking does the right to appropriate alternative care provided by the State kick in. This means that parents and families are primarily responsible for providing for the care and protection of their children. The State does have an obligation however to support parents and families in this duty. State support for children in the care of their parents or

families would include social services that support the family in their duties towards their children, as well as broad socio-economic interventions such as housing and social security.

The State must deliver care services when parents cannot

The State has a direct duty to provide care and protection for children who do not enjoy family care either because they are physically removed from the family environment or because the family is too poor to provide for the child.

The fact that the State is the primary duty-bearer towards children who are in its care was unequivocally accepted by the High Court in the *Centre for Child Law and Another v MEC of the Gauteng Department of Social Development and Others* judgment (better known as the *Lukhoff* case). The fact that

the State also has duties to provide care and protection to children who live with parents who are too poor to care for them has been accepted by the Constitutional Court in *Grootboom* and was more rigorously accepted in the *Treatment Action Campaign* case.

The State must deliver protection services to all children

In *Grootboom* the Court stated that even in relation to children who live in the family environment, the State is obliged to provide mechanisms to protect all children against any form of abuse or neglect. Social services protecting against any form of abuse and neglect should therefore be directed both at children who live in family environments and children who don't.

The State must provide services to address causes of children's vulnerability

South Africa has committed itself to achieving substantive equality by including a strong and pro-active right to equality in the Bill of Rights. Children's right to social services must therefore be read in the context of the right to equality. This means people with any kind of disadvantage are entitled to extra protection to ensure that they enjoy equal opportunity. In relation to the socio-economic rights outlined in diagram 3, this means that the State must ensure that the needs of the most vulnerable members of society are prioritised. In relation to children's right to social services it means that vulnerable groups of children (for example, children who are refugees or children with disabilities) are entitled to specific services that address the cause and effects of their vulnerability.

What is the relationship between broad socio-economic rights and children's rights to care, protection and social services?

The realisation of socio-economic rights through interventions for children and their caregivers has great potential to give effect to the rights to care and protection of children. In fact, in an overall developmental social welfare system, many government departments have an obligation to deliver prevention services. For example, a comprehensive anti-retroviral programme for HIV-positive persons would help infected parents to remain healthy and therefore to provide for, care and protect their children, which in turn would prevent the State from having to take on this obligation. Similarly, Child Support Grants have been shown to reduce neglect of children by, for instance, increasing food security and school attendance. These type of interventions, while very important, do not fall under the right to social services because

they are covered under the other socio-economic rights. There is a great need for different government departments to co-ordinate and integrate a range of services that could fall into the category of 'prevention' to stop child abuse and neglect and to keep children in families.

What are the conclusions?

This essay distinguishes social services from other interventions aimed at social and economic development such as health, education and social security, which all form part of the developmental social welfare system. The ambit of the right to social services extends from family support services to protection services as well as services for especially vulnerable children and children in need of care outside the family environment. The full range of services will need to be implemented to give effect to children's right to social services.

The essay argues that the right to social services must be treated differently from pure socio-economic rights. This has an important implication in that social services therefore should not be subject to progressive implementation. Furthermore, the right to social services applies even in situations where children live with their parents. Finally, the essay argues that reading the right together with the right to equality implies the right to special services for vulnerable children. Social services must also correspond with broad socio-economic empowerment envisaged under the developmental social welfare system and in the Constitution.

Now that the right to social services has been more clearly defined, the extent to which the Children's Act gives effect to this right can be measured – especially with regard to the funding and provisioning of services which prevent abuse and neglect.

Sources

This essay was primarily informed by:

Dutschke M (2007) *Rights in brief: Defining children's constitutional right to social services*. Cape Town: Children's Institute, UCT

Dutschke M (2006) *Defining children's right to social services*. A Project 28 working paper, July 2006. Cape Town: Children's Institute, UCT.

See these publications for the complete list of references which informed arguments made here. (www.ci.org.za)

Other sources

Centre for Child Law and Another vs The MEC of The Gauteng Department of Social Development and Others 2004. Transvaal Provincial Division case number 22866/04 (unreported). [Commonly referred to as "the Lukhoff case".]

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).

Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1003.